No. 88-381

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1988

JOHN GEEVER AND CHARLENE GEEVER,

Appellants,

v.

STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF ILLINOIS

JURISDICTION STATEMENT

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QUESTION PRESENTED

Whether Illinois Revised Statutes Chapter 38, Section 11.20.1(a)(2) is violative of the First Amendment to the United States Constitution when applied to prohibit mere possession in one's own home of obscene photographs depicting persons under the age of eighteen (18) years of age.

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ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

Appellants respectfully appeal from the judgment below, of the Illinois Supreme Court entered on May 31, 1988. This jurisdictional statement is submitted to show that the Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 122 Ill.2d 313. It is also reported at 119 Ill. Dec. 341 and at 522 N.E.2d 1200. It is reproduced in the Appendix.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on March 23, 1988. A timely Petition for Rehearing was denied on May 31, 1988. The jurisdiction of this Court is in-

voked pursuant to 28 U.S.C. Section 1257(2). Notice of Appeal to this Court was filed with the Illinois Supreme Court and with the Trial Court (the Circuit Court of DuPage County, Eighteenth Judicial Circuit, Illinois) on August 19, 1988.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FIRST AMENDMENT, UNITED STATES CONSTITUTION

Congress shall make no law. . .abridging the freedom of speech. . .

ILLINOIS REVISED STATUTES (1985), CHAPTER 38, SECTION 11-20.1(a)

11-20.1(a) A person commits the offense of child pornography who:

(1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or reproduction any child who he knows or reasonably should know to be under the age of 18 where such child is:

(i) actually or by simulation engaged in any act of sexual intercourse with any person or animal; or

(ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus, or sex organs of another person or animal; or which involves the mouth, anus or sex organs of the child and the sex organs of another person or animal; or

(iii) actually or by simulation engaged in any act of masturbation; or

(iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of

lewd fondling, touching, or caressing involving another person or animal; or

(v) actually or by simulation engaged in any act of excretion or urination within the sexual context; or

(vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or

(vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the genitals of the child or other person; or

(2) with the knowledge of the nature or content thereof, reproduces, disseminates, offers to disseminate, exhibits or possesses any film, videotape, photograph or other similar visual reproduction of any child whom the person knows or reasonably should know to be under the age of 18 engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection. . .

(c) . . .violation of paragraph (2) of subsection (a) is a class 4 felony with a mandatory minimum fine of $1,000 and a maximum fine of $25,000.

STATEMENT OF THE CASE

On December 12, 1985, a DuPage County Grand Jury returned a nineteen count Indictment against the defendants, JOHN GEEVER and CHARLENE GEEVER. Counts one through twelve of the Indictment each charged the defendants with having possessed a photograph depicting child pornography in violation of Illinois Revised Statutes, Chapter 38, Section 11–20.1(a)(2). Prior to trial, the defendants filed a written Motion to Dismiss counts one through twelve of the Indictment. The motion alleged that

Illinois Revised Statutes, Chapter 38, Section 11 – 20.1(a)(2) is unconstitutional under the First and Fourteenth Amendments to the United States Constitution insofar as it purports to criminalize the mere possession in the home of photographs depicting child pornography as defined by the statute.

At oral argument in the trial court, the State conceded that the photographs which were the basis of counts one through twelve of the Indictment had been obtained by the State from the defendant's home. The photographs were obtained by the police upon their execution of a search warrant that authorized them to search the home of the defendants, Mr. and Mrs. Geever, at 102 McClellan, Bartlett, Du Page County, Illinois.

After hearing oral argument on the matter, the trial court granted the motion of the defendants to dismiss counts one through twelve of the Indictment. The oral pronouncement of the trial court granting the Motion to Dismiss is contained in the Appendix herein. The State of Illinois thereafter appealed the trial court's decision to the Illinois Supreme Court. The Illinois Supreme Court consolidated the appeal with the State's appeal of a case from Cook County, *People v. Peter Sotos*. The *Sotos* appeal involved the same issue as was presented in the *Geever* appeal. The Illinois Supreme Court reversed the decision of the trial court in the *Geever* appeal. The Illinois Supreme Court ruled that the statutory section in question was not violative of the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment, when applied to the factual situation presented in the case at bar, to-wit to mere private possession in the home. The decision of the Illinois Supreme Court was rendered on March 23, 1988. Thereafter, Mr. and Mrs. Geever filed a timely Petition for Rehearing. Their Petition for Rehearing was denied by the Illinois Supreme Court on May 31, 1988. Thereafter, Mr. and

Mrs. Geever filed a timely Notice of Appeal to the United States Supreme Court, with the Illinois Supreme Court Clerk on August 19, 1988.

THE QUESTION IS SUBSTANTIAL

The question as to the scope of the First Amendment's right to receive information and ideas, regardless of their social worth, in the context of one's own home library is a substantial one. It has previously been addressed by this Court on only one prior occasion: in the case of *Stanley v. Georgia*, 394 U.S. 557 (1969). In *Stanley v. Georgia*, this Court held that "the mere private possession of obscene matter cannot constitutionally be made a crime." Id. at 559. The Court agreed with the defendant Stanley that the Georgia obscenity statute under which he was convicted "insofar as it punishes mere private possession of obscene matter, violates the First Amendment as made applicable to the States by the Fourteenth Amendment." Id. at 559.

The case at bar concerns the constitutionality of a state statute that criminalizes the mere possession in the confines of one's own home of photographs depicting child pornography. The question as to whether possession of child pornography in the home is covered by this Court's decision in *Stanley v. Georgia* is a novel and substantial one.

Because the *Stanley* decision is the only case that concerns itself with the authority of state government to censor what one may read or look at in one's own home library, it would seem that the statute in the case at bar is clearly unconstitutional. However, the Illinois Supreme Court affirmed the constitutionality of Illinois' criminal censorship statute in the case at bar. It did so by citing the Court's more recent decision in *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, this Court held that laws regulating child pornography dissemination do not have to meet the obscenity test set out

in *Miller v. California*, 413 U.S. 15 (1973), in order for said materials to fall outside the parameters of the First Amendment's protections. This Court's decision in *New York v. Ferber* was based in large part upon the Court's recognition that states have a "compelling" interest in the protection of the health and welfare of children.

However, the Court in *New York v. Ferber* was not concerned with the issue of mere possession of child pornography in the home. It may be admitted that child pornography materials do generally fall outside of the First Amendment's protection. The issue is whether a state may, consistent with the First Amendment, censor an individual from merely looking at, and possessing within one's own home library, those same materials that it may validly regulate the dissemination or public exhibition of.

The authority of state government to criminalize and forbid persons from showing certain materials is not at issue in this case. The authority of state government to criminalize and forbid persons from looking at those materials is. The distinction is crucial for First Amendment analysis purposes. Censorship of the actor or speaker is permitted under certain circumstances when due regard for competing concerns warrants same. Thus, statutes regulating exhibition or dissemination of child pornography materials are permissible under the First Amendment. But government imposed censorship of the receiver, of the viewer or listener is a far different, more serious matter than censorship of the speaker. This Court in *Stanley v. Georgia* recognized this distinction. It recognized that the power to censor the receiver of an idea was a far more serious type of intrusion for government to make. And it recognized and held that such censorship struck at the very core of our First Amendment, its ideals and its heritage. The Court thus held:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting

> alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
>
> And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment... Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority." Id. at 565, 566.

Illinois Supreme Court Justice Clark, in his dissenting opinion in the case at bar also recognized that the power of government to censor the receiver, and to criminally punish him for so viewing or receiving, strikes at the very heart of the First Amendment's concerns. Thus he wrote in his dissent:

> "Beyond its political or cultural functions, free speech serves a psychological purpose. It grants wide latitude even to the passive consumer of speech. It guarantees to adults the right to form their own personalities and tastes by their own choice of written, printed, or visual matter. (See *Bolger v. Youngs Drug Products Corp.* (1983), 463 U.S. 60, 77 L. Ed. 2d 469, 103 S. Ct. 2875.) It protects in certain instances speech which is inarticulate, incoherent, or crude. (See *Cohen v. California* (1971), 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780.) As a general rule, it forbids the government from attempting through criminal sanctions to control what people privately read, view, or

think. This protection is premised upon the notion that privacy of thought (see, *e.g., Wooley v. Maynard* (1977), 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428) and, even, in certain instances, privacy of behavior, are crucial to the maintenance of political and cultural freedom. As one commentator has put it:

'The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.' Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. Rev. 962, 1003 (1964).

The qualities of mind and spirit needed by adult members of a free society will not often be found among people who fear governmental intrusion into their bedrooms and reading rooms." 122 Ill. 2d 313 at 332, 333.

It is respectfully submitted that the Illinois Supreme Court has misinterpreted both *Stanley v. Georgia* and *New York v. Ferber*. The Illinois Supreme Court failed to perceive that the *Stanley* decision was based on the realization that censorship of the receiver has a devastating effect on First Amendment freedoms. The Illinois Supreme Court has also misread *New York v. Ferber* to grant it authority to replace *Stanley's* constitutional bright line rule that states may not criminalize the mere possession of obscene material in the

home with a case by case (ad hoc) balancing approach. However, *New York v. Ferber* did not concern itself with the issue of mere possession of child pornography. It dealt only with the power of state government to criminalize sales of movies showing children engaged in sexual, but not perhaps obscene, activity. It dealt with censorship of the speaker, not with censorship of the receiver. Lastly it did not authorize an imprecise "balancing test" to be used in an analysis of First Amendment issues. Because *New York v. Ferber* did not concern a factual situation of mere possession in one's own home, it is not applicable to the factual situation in the case at bar. The concern in *Ferber* was not on the constitutional right to receive ideas. That concern was considered by this Court only in *Stanley v. Georgia*. Therefore, the following words used by this Court in *Stanley* are as applicable to the case at bar as they were to the facts of that case:

> "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press)...necessarily protects the right to receive...' This right to receive information and ideas, regardless of their social worth is fundamental to our free society. Moreover, in the context of this case – a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home – that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs,

> their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man.'
>
> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases – the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library." [Emphasis added.] [Citations omitted] Id. at 564, 565.

Thus the interests of the individual at stake here are the interests of all United States citizens to enjoy First Amendment freedoms and to be free of unwarranted invasions of privacy and censorship in the home.

In conclusion, *Stanley v. Georgia* prohibits a State from criminalizing the mere private possession of pornography in the home. In the case at bar, the defendants John and Charlene Geever are charged with the mere private possession in their own home of pornographic photographs. Each of Counts one through twelve of the indictment returned against them is based upon mere possession of a particular photograph. Each of these counts is based upon a private act of possession in the home. None of these counts allege any distribution, production, sale or possession with intent to sell. Nor do they allege any showing or exhibition to anyone else. If any of the above were alleged, defendants might agree that such could legitimately be made the subject of criminal sanctions, if the State should choose to do so.

However, to criminalize the mere possession in the home of obscenity, whether it involves subjects over eighteen or under eighteen ignores the decision and reasoning of the United States Supreme Court in *Stanley v. Georgia*. Moreover, to uphold such legislation would start the courts

out on a dangerous course. Once censorship of what a person may look at or read, while home alone in the privacy of his own library is accepted, then the validity of such censorship will be the premise for the next legislative enactment. Should this court uphold the legislation in the case at bar a dangerous precedent will have been set: censorship in the privacy of one's own home will have become an accepted means to accomplish a legislative goal (other than merely protecting the mind of the obscenity viewer). It would seem then that any legislative judgment that concerned the effects on the subjects (victims) of pornography photographs would prevail over the First Amendment and privacy interests involved, especially if supported by alarmist studies of so-called "experts in the field."

If we can enact censorship to save the seventeen year old victim/subject, then why not save the twenty year old victim/subject too? What if the legislative judgment concerns the young unwed mother who subjects herself to photographs for the purpose of providing for her family? What if it concerns the young career girl who has chosen to be a model, but is forced by economic necessity to compromise her ideals in order to keep herself in the field of modeling? Perhaps then we should censor all photographs of young women whom the possessor knows or has reason to know are under thirty or thirty-five? As the United States Supreme Court warned in *Stanley*, quoting from *Roth v. United States*, 354 U.S. 476 (1957), "ceaseless vigilance is the watchward to prevent...erosion (of First Amendment rights) by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed." Id. at 563.

Stanley v. Georgia remains good law. Moreover, defendants respectfully submit that its holding is controlling in the case at bar. Defendants, therefore, respectfully request of

this Court that it should affirm the ruling of the trial court in the case at bar.

Courts of review in Ohio and Alabama have also recently read *New York v. Ferber* as authority to allow state government to criminalize mere possession of child pornography materials in one's own home. *State v. Meadows*, 28 Ohio St. 3d 43, 503 NE 2d, 697 (1986); *Felton v. State*, (Ala. Crim. App. Dec. 30, 1986).

The question as to the scope of the First Amendment's protection for the individual to read and view what he chooses, in the privacy of his own home, without government censorship is an important and substantial one. It is the question presented in this appeal.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ILLINOIS
122 Ill.2d 313, decided March 23, 1988
Docket Nos. 64173, 64466 consolidated

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. JOHN E. GEEVER *et al.*, Appellees.—THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. PETER SOTOS, Appellee.

JUSTICE WARD delivered the opinion of the court:

On December 12, 1985, the defendants under docket No. 64173, John and Charlene Geever, were charged in an indictment with, *inter alia*, 12 counts of possession of child pornography in violation of section 11—20.1(a)(2) of the Criminal Code of 1961 (Ill. Rev. Stat. 1985, ch. 38, par. 11—20.1(a)(2)). The defendants moved to dismiss the possession counts contending that section 11—20.1(a)(2) was unconstitutional as violating the first and fourteenth amendments of the Constitution of the United States (U.S. Const., amends. I, XIV), and article I, sections 4 and 6, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. 1, §§4, 6). The circuit court of Du Page County allowed the motion, holding that, under *Stanley v. Georgia* (1969), 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243, section 11—20.1(a)(2) was unconstitutional as applied to the defendants, on the ground that under the first and fourteenth amendments, the possession of child pornography in their home was permitted. On January 8, 1986, the defendant under docket No. 64466, Peter Sotos, was indicted in three counts for possession of child pornography in his home. Upon his motion to dismiss, the circuit court of Cook County also held section 11—20.1(a)(2) unconstitutional on the same ground. The State, under our Rule 603 (107 Ill. 2d R. 603), directly appealed the dismissals to this court, and we have consolidated the appeals.

The question is whether the State, consistent with the constitutional guarantees of the first and fourteenth amendments (U.S. Const., amends. I, XIV), can proscribe the knowing possession of child pornography in the home.

Section 11–20.1(a)(2) in part provides that the offense of child pornography is committed when a person:

> "with the knowledge of the nature or content thereof, reproduces, disseminates, offers to disseminate, exhibits or *possesses* any film, videotape, photograph or other similar visual reproduction of any child whom the person knows or reasonably should know to be under the age of 18 [hereinafter referred to as child or children] engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection [offense of child pornography]." (Emphasis added.) (Ill. Rev. Stat. 1985, ch. 38, par.11–20.1(a)(2).)

The prohibited portrayals are those where the child is:

> "(i) actually or by simulation engaged in any act of sexual intercourse with any person or animal; or
>
> (ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus, or sex organs of another person or animal; or which involves the mouth, anus or sex organs of the child and the sex organs of another person or animal; or
>
> (iii) actually or by simulation engaged in any act of masturbation; or
>
> (iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal; or
>
> (v) actually or by simulation engaged in any act of excretion or urination within a sexual context; or

(vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or

(vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the genitals of the child or other person." Ill. Rev. Stat. 1985, ch. 38, pars. 11–20.1(a)(1)(i) through (a)(1)(vii).

The defendants contend, and the respective circuit courts agreed, that their right to freedom of thought and expression in the privacy of their own home, as recognized in *Stanley v. Georgia* (1969), 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243, precludes the State from making criminal the possession of child pornography in the home.

In *Stanley v. Georgia* (1969), 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243, pursuant to a search warrant, Federal and State agents of Georgia searched the defendant's home for evidence of bookmaking activities; in the process, the agents discovered three reels of film. Viewing the films, the agents determined that they were obscene and arrested the defendant for possession of "obscene matter." The defendant was indicted for "knowingly hav[ing] possession of *** obscene matter' in violation of Georgia law." On appeal, the Supreme Court held that the Georgia statute was unconstitutional as violative of the first and fourteenth amendments.

In striking down the statute, the Court observed that in its prior decision in *Roth v. United States* (1957), 354 U.S. 476, 485, 1 L. Ed. 2d 1498, 1507, 77 S. Ct. 1304, 1309, it held that " 'obscenity is not within the area of constitutionally protected speech or press.' " (*Stanley v. Georgia* (1969), 394 U.S. 557, 560, 22 L. Ed. 2d 542, 546, 89 S. Ct. 1243, 1245.) The Court, however, stated that the fact that material is obscene and without protection of the first amendment does not preclude the Court from inquiring into the government's interest in regulating obscenity, as that interest cannot, in

every circumstance, be insulated from all constitutional protections. *Stanley v. Georgia* (1969), 394 U.S. 557, 563, 22 L. Ed. 2d 542, 548, 89 S. Ct. 1243, 1246-47.

In examining the constitutional considerations involved in a State statute prohibiting the simple possession of obscene materials in the home, the Court stated:

> "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive . . . .' [Citations.] This right to receive information and ideas, regardless of their social worth [citation], is fundamental to our free society. Moreover, in the context of this case – a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home – that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy.***
>
> ***Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia* (1969), 394 U.S. 557, 564-65, 22 L. Ed. 2d 542, 549-50, 89 S. Ct. 1243, 1247-48.

Recognizing the limitation upon a government's right "to control men's minds." the Court rejected Georgia's contention that it could prohibit the possession of obscenity in the home. Georgia argued that it had the right "to protect the

individual's mind from the effects of obscenity." The Court rejected this as "wholly inconsistent with the philosophy of the First Amendment," in that it attempted to control the moral content of a person's thoughts. (*Stanley v. Georgia* (1969), 394 U.S. 557, 565-66, 22 L. Ed. 2d 542, 550, 89 S. Ct. 1243, 1248.) The Court also rejected the claim that such obscene materials "may lead to deviant sexual behavior or crimes of sexual violence." The Court said that not only was there scant empirical data to support that conclusion, but also that if the State's concern rested solely upon the basis that the private consumption of such printed material caused antisocial behavior, the ordinary deterrents of education and criminal punishment were available for violations of the law. 394 U.S. at 566, 22 L. Ed. 2d at 550, 89 S. Ct. at 1249.

Rejecting Georgia's arguments, the Supreme Court held the statute unconstitutional on the ground that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.*** [Although] the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." *Stanley v. Georgia* (1969), 394 U.S. 557, 568, 22 L. Ed. 2d 542, 551, 89 S. Ct. 1243, 1249-50.

Thirteen years later in *New York v. Ferber* (1982), 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348, the Supreme Court was presented with the issue of whether the State of New York, consistent with the first amendment, could prohibit the dissemination of material depicting children under the age of 16 engaged in sexual conduct, regardless of whether such depiction was legally obscene.

The defendant in *Ferber* , the proprietor of a bookstore specializing in sexually oriented materials, sold two films to an undercover police officer; the films primarily depicted two young boys masturbating. The defendant was indicted on two counts of promoting an obscene sexual performance

and two counts of violating section 263.15 of the New York penal law, which provided:

> "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." (N.Y. Penal Law §263.15 (McKinney 1980).)

The defendant was found guilty on the two counts under section 263.15, without proof that the films were obscene. The New York Court of Appeals, however, reversed on the ground that section 263.15 violated the first amendment. Although the court recognized the "State's legitimate interest in protecting the welfare of minors" and noted this "interest may transcend First Amendment concerns," the court held the New York statute unconstitutional.

The Supreme Court in *Ferber* began its opinion with the observation that "[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem.*** '[C]hild pornography and child prostitution have become highly organized, multi-million dollar industries that operate on a nationwide scale.' S. Rep. No. 95–438, p.5 (1977)." (*New York v. Ferber* (1982), 458 U.S. 747, 749 and n.1, 73 L. Ed. 2d 1113, 1117 and n.1, 102 S. Ct. 3348, 3350 and n.1.) The Court then considered whether a State has greater authority "in proscribing works portraying sexual acts or lewd exhibition of genitalia by children" than proscribing obscene materials portraying adult activity.

In addressing this, the Court said that the obscenity standard as set forth in *Miller v. California* (1973), 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, would not be applied to the area of child pornography. The standard in *Miller* provided that a " 'state offense must be limited to works, which taken as a whole, appeal to the prurient interest in sex, which portrays

sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.' " (*New York v. Ferber* (1982), 458 U.S. 747, 755, 73 L. Ed. 2d 1113, 1121, 102 S. Ct. 3348, 3353.) The *Ferber* Court reasoned:

> "The *Miller* standard, like its predecessors, was an accommodation between the State's interests in protecting the 'sensibilities of unwilling recipients' from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws. Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are persuaded that the States are entitled to *greater leeway in the regulation of pornographic depictions of children.*" (Emphasis added.) 458 U.S. at 756, 73 L. Ed. 2d at 1122, 102 S. Ct. at 3354.

The Court recognized objectives and justifications of the State for imposing restraints on the commercial production and distribution of child pornography. First, the Court determined that a State's interest in safeguarding the physiological and psychological well-being of a minor is a " 'compelling' " State interest, and that the prevention of the exploitation of children is a governmental objective of surpassing importance. (*New York v. Ferber* (1982), 458 U.S. 747, 756-57, 73 L. Ed. 2d 1113, 1122-23, 102 S. Ct. 3348, 3354-55.) The Court said: " 'A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.' [Citation.] Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth *even when the laws have operated in the sensitive area of constitutionally protected rights.*" (Emphasis added.) (458 U.S. at 757, 73 L. Ed. 2d at 1122, 102 S. Ct. at 3354.) The Court further stated

that "[t]he legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." 458 U.S. at 758, 73 L. Ed. 2d at 1123, 102 S. Ct. at 3355.

Second, the Court said that the distribution of photographs and films depicting children engaged in sexual activity is "intrinsically related" to the sexual abuse of children in at least two ways. "First, the materials produced are a permanent record of the children's participation[,] and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." (458 U.S. at 759, 73 L. Ed. 2d at 1124, 102 S. Ct. at 3355-56.) The Court noted that the most expeditious and practical method of law enforcement may be to "dry up the market for this material" by imposing severe criminal sanctions upon those persons engaged in selling, advertising or promoting such material. 458 U.S. at 760, 73 L. Ed. 2d at 1124, 102 S. Ct. at 3356.

Recognizing the resulting physical and emotional harm to the child, the Court rejected the defendant's argument that a State would sufficiently protect its interests in the welfare of its children by prohibiting the distribution of materials that are legally obscene under the *Miller* standard. The Court stated:

> "While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus,

> the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be 'patently offensive' in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. 'It is irrelevant to the child [who has been abused] whether or not the material. . .has a literary, artistic, political, or social value.' [Citation.] We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem." *New York v. Ferber* (1982), 458 U.S. 747, 760-61, 73 L. Ed. 2d 1113, 1125, 102 S. Ct. 3348, 3356-57.

Observing that the advertising and selling of child pornography provides the financial incentive to produce child pornography, the Court stated that " '[i]t rarely has been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.'" Too, the Court commented that the value of child pornography as an important and necessary part of a literary performance, or scientific or educational work is "exceedingly modest, if not de minimis." (458 U.S. at 761-62, 73 L. Ed. 2d at 1125-26, 102 S. Ct. at 3357.) Thus, the Court concluded, when a definable class of material bears so heavily and pervasively on the welfare of the children involved in its creation and production, the balancing of competing interests is struck and it is recognized that these materials are without protection of the first amendment. 458 U.S. at 764, 73 L. Ed. 2d at 1127, 102 S. Ct. at 3358.

The Court stated that in determining what constitutes child pornography: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." (458 U.S. at 764, 73 L. Ed. 2d at 1127, 102 S. Ct. at 3358.) In order, however, to impose criminal sanctions for the distribution of child pornography, the Court said that there must be some element of scienter on the part of the defendant. (458 U.S. at 765, 73 L. Ed. 2d at 1127, 102 S. Ct. at 3358.) The State's right, however, to regulate the dissemination of child pornography is not without limitation: "the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed," and the category of " 'sexual conduct' proscribed must also be suitably limited and described." (458 U.S. at 764, 73 L. Ed. 2d at 1127, 102 S. Ct. at 3358.) As to other depictions of sexual conduct, not otherwise obscene and not involving live performances, their production or reproduction, the Court said these materials do have the protection of the first amendment. 458 U.S. 747, 764-65, 73 L. Ed. 2d 1113, 1127, 102 S. Ct. 3348, 3358.

In construing a statute, a court is to ascertain and give effect to the legislature's intent in its enactment. Considering a statute in its entirety, a court notes the subject it addresses and the legislature's apparent objective. It will be presumed that the legislature acted in light of the provisions of the Constitution and did not propose to act inconsistently with its protections. Accordingly, a court must construe a statute as not offending the Constitution, provided that the construction is a reasonable one. *Gill v. Miller* (1983), 94 Ill. 2d 52, 56.

It is apparent on the face of the statute that the legislature's purposes in enacting section 11–20.1(a)(2) were to effectively prevent and control the sexual abuse and

exploitation of children. The legislature intended to prevent not only the production and dissemination of child pornography, but also its possession as well. (Ill. Rev. Stat. 1985, ch. 38, par. 11–20.1(a)(2).) In proscribing the possession of child pornography, the legislature did not make exceptions.

We, as the Supreme Court did in *Ferber*, recognize that the sexual exploitation of children has become a grave national problem and one that has seriously infected our State. Our appellate court has noted:

> "Congressional investigations indicate that Chicago is a major center for producing and disseminating child pornography. However, it is often impossible to determine the source of child pornography. It is quite common for photographs made in the United States to be sent to foreign countries to be reproduced and then returned to this country to give the impression of foreign origin. (Senate Committee On The Judiciary, Protection of Children Against Sexual Exploitment Act of 1977, S. Rep. No. 95–438, 95th Cong., 1st Sess. 5,6 (1977).)" *People v. Schubert* (1985), 136 Ill. App. 3d 348, 353.

The emphasis in *Stanley* was on the right to freedom of thought and mind in the privacy of one's own home. (*United States v. Thirty-Seven Photographs* (1971), 402 U.S. 363, 376, 28 L. Ed. 2d 822, 834, 91 S. Ct. 1400, 1408.) Although "[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education" (*United States v. Orito* (1973), 413 U.S. 139, 142, 37 L. Ed. 2d 513, 517, 93 S. Ct. 2674, 2677), that protection is not without limitation. (See *Bowers v. Hardwick* (1986), 478 U.S. ___, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (where the Supreme Court held that the due process clause of the fourteenth amendment does not confer a right of privacy to homosexuals to commit sodomy in the privacy of their

homes).) This was made clear in *Stanley* by language which clearly limited the Court's holding to the facts of the case:

> "What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.
>
> *Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials.* *** In such cases, *compelling reasons may exist for overriding the right of the individual to possess those materials.*" (Emphasis added.) *Stanley v. Georgia* (1969), 394 U.S. 557, 568 n.11, 22 L. Ed. 2d 542, 551 n.11, 89 S. Ct. 1243, 1249-50 n. 11.)

And as the Court recognized in *Ferber*, the States have a "compelling" interest in the protection of the health and welfare of children, and therefore, are entitled to greater leeway in the regulation of pornographic depictions of children. *New York v. Ferber* (1982), 458 U.S. 747, 756-57, 73 L. Ed. 2d 1113, 1122, 102 S. Ct. 3348, 3354.

The purpose of the statute, unlike that in *Stanley*, is not to limit the individual's freedom of thought and mind in his own home, nor is its purpose to regulate the "moral content" of the depictions described. The purpose of section 11–20.1(a)(2) is to prevent the sexual abuse and exploitation of children by "drying up" the market for child pornography. (See *People v. Spargo* (1982), 103 Ill. App. 3d 280, 285.) The incentive for the production and dissemination of child pornography is the ability to sell or distribute the pornography to the ultimate customer or possessor. In prohibiting without

restriction possession of child pornography, the legislature has sought to "dry up" the final and most important link in the chain of distribution of child pornography.

Unlike *Stanley*, where the Court determined there was no empirical data to link the private possession in the home of obscenity with deviate sexual behavior or crimes of sexual violence, the private possession of child pornography further exacerbates the harm and abuse to the child victim.

> "The injury suffered by child victims of pornography is akin to that experienced by the victims of sexual abuse and prostitution. Yet, pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. Therefore, even if the child can overcome the humiliation of the act of posing itself, he must carry with him the distressful feeling that his act has been recorded for all to see." (Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981).)

See also *New York v. Ferber* (1982), 458 U.S. 747, 759, 73 L. Ed. 2d 1113, 1124, 102 S. Ct. 3348, 3355-56; *People v. Spargo* (1982), 103 Ill. App. 3d 280, 286; Clinton, *Child Protection Act of 1984 – Enforceable Legislation to Prevent Sexual Abuse of Children*, 10 Okla. City U.L. Rev. 121, 146-47 (1985); Donnelly, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12:2 U. Mich. J.L. Ref. 295, 301 (1979).

In our political history and under our law the home has been regarded as a shielded place of privacy. There are cir-

cumstances, however, which call for the individual's right to this sanctuary to be balanced against critical interests of society. We consider that under the circumstances here the individual's assurance of full freedom of conduct in the home must yield, consistently with the Supreme Court's holding (*Bowers v. Hardwick* (1986), 478 U.S. ___, 92 L. Ed. 2d 140, 106 S. Ct. 2841), to society's "most compelling" interest to protect its children from the lasting harm of emotional and sexual degradation. The proscribing statute requires knowledge by the possessor as to the content or nature of the depictions, and it specifically describes in subparagraphs (i) through (vii) the depictions and conduct subject to the statute. We hold that the statute is not in violation of the first or fourteenth amendments of the Constitution of the United States or of article I, sections 4 and 6, of the Constitution of Illinois of 1970.

We are not the only court to reach such a conclusion. In *State v. Meadows* (1986), 28 Ohio St. 3d 43, 503 N.E.2d 697, *cert. denied* (1987), 480 U.S. ___, 94 L. Ed. 2d 771, 107 S. Ct. 1581, the defendant was arrested for possession of a picture and various magazines depicting children engaged in sexual activity in violation of an Ohio statute prohibiting such knowing possession. The materials were found in the defendant's hotel room, where he resided, pursuant to a search warrant. The defendant argued that the statute, to the extent it criminalized the private possession of material involving a minor participating or engaging in sexual activity, was unconstitutional under the first and fourteenth amendments.

The supreme court of Ohio upheld the constitutionality of the statute, determining that the State's interest in protecting children from the exploitation of child pornography was so compelling an interest that it justified intrusion upon the defendant's first amendment right to privacy of thought and mind in his home. The court stated:

> "Unlike the obscene materials considered in *Stanley, Miller*, et al., child pornography involves, by its nature, the physical, mental and sexual abuse, seduction and harmful exploitation of children. The depictions sought to be banned by the state are but memorializations of cruel mistreatment and unlawful conduct. Additionally, such material would continue to exploit and victimize the children shown by haunting them in the future. *** We believe the interests of the state in protecting the privacy, health, emotional welfare and well-rounded growth of its young citizens, together with its undeniable interest of safeguarding the future of society as a whole, comprise exactly the type of 'compelling reasons' justifying a 'very limited' First Amendment intrusion envisioned by the *Stanley* court. At the same time, the cost to the individual possessor's right of free speech, privacy and thought, caused by the state's banning of visual momentos from an episode of sexual abuse of a child, is slight. Moreover, the content value of such material is trifling and alternative means of stimulation exist." (*State v. Meadows* (1986), 28 Ohio St. 3d 43, 50, 503 N.E.2d 697, 703.)

The Court of Criminal Appeals of Alabama, in *Felton v. State* (Crim. App. Ala. Dec. 30, 1986), No. 8, Div. 547, in agreement with the reasoning of *State v. Meadows*, upheld the constitutionality of a statute criminalizing the possession of child pornography, though such possession may be in the home. The court held that child pornography does not come within the protection of *Stanley*. See also *United States v. Andersson* (7th Cir. 1986), 803 F.2d 902, 907 n.3 (where the court discusses that a State's interest in regulating child pornography "may well extend into the private home").

Also we would observe that several other States have enacted statutes that criminalize the knowing possession of

child pornography, with the criminal sanctions ranging from misdemeanor to felony. Ohio Rev. Code Ann. §2907.322(A)(5) (Baldwin 1986); Okla. Stat. Ann., title 21, §1021.2 (1987 Supp.); Nev. Rev. Stat. Ann., §200.730 (1986); S.D. Codified Laws, title 22–22–23.1 (1987 Supp.); Texas Penal Code Ann. §43.26(a)(1) (Vernon 1987 Supp.); Utah Code Ann. §76–5a–3(1)(a) (1987 Supp.); Wash. Rev. Code §9.68A.070(1) (1987 Supp.).

The defendants also argue that they were deprived of their right to due process in that they were not given fair notice under the Illinois statute that the "mere possession" of child pornography in the home was illegal. They contend that in possessing the child pornography they relied upon the decision in *Stanley* that the mere possession of obscene materials in the home could not be proscribed under the first and fourteenth amendments.

It is well settled that the "fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" (*Rose v. Locke* (1975), 423 U.S. 48, 49, 46 L. Ed. 2d 185, 188, 96 S. Ct. 243, 244; *People v. Parkins* (1979), 77 Ill. 2d 253, 256.) As this court has said:

> " 'Impossible standards of specificity, however, are not required. [Citations.] *** "Condemned to the use of words, we can never expect mathematical certainty from our language." [Citation.] *** [A] court will assume, absent contrary legislative intent, that the words of the statute have their ordinary and popularly understood meanings. [Citation.] In addition to the language used, consideration is to be given to the legislative objective and the evil the statute seeks to remedy." [Citation.] [As we said before,] [a] statute enjoys a presumption of constitutionality. [Citation.]' "

People v. Parkins (1979), 77 Ill. 2d 253, 256-57, quoting *People v. Schwartz* (1976), 64 Ill. 2d 275, 280-82.

We determine here that the statutory language of section 11–20.1(a)(2) provides sufficient notice as to what conduct is proscribed; therefore, the defendants' right to due process has not been violated. Too, the defendants' reliance on their interpretation of *Stanley* as giving them the right to possess child pornography in the home is misplaced.

For the reasons given, the judgments of the circuit courts are reversed and these causes are remanded for proceedings consistent with this opinion.

Judgments reversed;
causes remanded.

JUSTICE CLARK, dissenting:

This is a difficult case, and it is with great reluctance that I dissent from the well-written majority opinion.

The material which the defendants are charged with possessing is admittedly repugnant. The State's power to ban its commercial production and distribution is clear. (*New York v. Ferber* (1982), 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348.) But I cannot agree that the State may peremptorily proscribe part of the contents of a private library, even if the material proscribed is usually unprotected by the first amendment. Where private possession of visual, written, or printed materials is concerned, the State must make a showing that the proscription is necessary to vindicate a compelling interest which cannot be served by some more narrowly tailored means. (See *Stanley v. Georgia* (1969), 394 U.S. 557, 568 n.11, 22 L. Ed. 2d 542, 551 n.11, 89 S. Ct. 1243, 1249 n.11.) Since I see no evidence except the assertion that the State cannot secure its admittedly compelling interests by banning the production and distribution of child pornography, rather

than its private possession, I believe that this statute violates the first and fourteenth amendments to the Federal Constitution. Even assuming, however, that the statute does not fall afoul of the Federal Constitution, I am nevertheless convinced that it violates article I, sections 4 and 6, of our State constitution. For these reasons, I respectfully dissent.

I

Analysis of any first amendment question must begin with two inquiries: (1) Is the activity which the State seeks to regulate within the protection granted to "speech" under the first amendment? and, if so: (2) What is the standard of persuasion or proof that the State must meet in order to justify its regulation?

The contours of the "speech" protected by the first amendment are determined by reference to the amendment's basis purposes. Speech is protected against governmental intrusion for reasons which range from the political and societal to the cultural and personal.

Freedom of speech, particularly freedom of political speech, is a necessary precondition for the maintenance of democratic self-government. (T. Emerson, The System of Freedom of Expression 46-48 (1970); A. Meikeljohn, Political Freedom 24-28 (1965).) A representative democracy presupposes the free competition of political ideas in the electoral marketplace. Political minorities must be given the chance to be heard and to persuade. No transient political majority can be granted a monopoly on free speech. (*Gitlow v. New York* (1925), 268 U.S. 652, 673, 69 L. Ed. 1138, 1149, 45 S. Ct. 625, 632 (Holmes, J., dissenting).) It is this need to maintain the preconditions necessary for political democracy that justifies the judicial abrogation of the will of an elected legislature.

Aside from its political importance, free speech serves several separate, and less obvious, functions. The first

amendment protects not only political speech, but also various forms of nonpolitical communication, including nonpolitical art, music, and entertainment. (*Winters v. New York* (1948), 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665.) Communicative expression is protected partially because it is a necessary adjunct to political expression, and partially because the line between political and nonpolitical speech is not easily drawn. (F. Haiman, Speech & Law in a Free Society 171 (1981).) It is also protected for independent reasons: because it plays an essential role in the intellectual and moral development of a free people; because governmental censorship of its production has, historically, undermined the ability of artists to create works of import and value; and because the leisure to exchange and enjoy our creative expressions is one of the goods people seek from life in a civilized society.

Beyond its political or cultural functions, free speech serves a psychological purpose. It grants wide latitude even to the passive consumer of speech. It guarantees to adults the right to form their own personalities and tastes by their own choice of written, printed, or visual matter. (See *Bolger v. Youngs Drug Products Corp.* (1983), 463 U.S. 60, 77 L. Ed. 2d 469, 103 S. Ct. 2875.) It protects in certain instances speech which is inarticulate, incoherent, or crude. (See *Cohen v. California* (1971), 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780.) As a general rule, it forbids the government from attempting through criminal sanctions to control what people privately read, view, or think. This protection is premised upon the notion that privacy of thought (see, *e.g., Wooley v. Maynard* (1977), 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428) and, even, in certain instances, privacy of behavior, are crucial to the maintenance of political and cultural freedom. As one commentator has put it:

> "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to

> public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual." Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. Rev. 962, 1003 (1964).

The qualities of mind and spirit needed by adult members of a free society will not often be found among people who fear governmental intrusion into their bedrooms and reading rooms.

With these purposes in mind, the United States Supreme Court has delineated categories of spoken, visual, or printed matter which are not "speech" protected by the first amendment because they "are no essential part of any exposition of ideas, and are of such slight social value that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766.) At one time these categories included defamation (*Beauharnais v. Illinois* (1952), 343 U.S. 250, 96 L. Ed. 919, 72 S. Ct. 725), commercial speech (*Valentine v. Chrestensen* (1942), 316 U.S. 52, 86 L. Ed. 1262, 62 S. Ct. 920), obscenity (*Roth v. United States* (1957), 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304) and fighting words (*Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 86 L. Ed. 1034, 62 S. Ct. 766). More recently, the Supreme Court has partially dropped defamation (*New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710) and commercial speech (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976), 425 U.S. 748, 48 L.

Ed. 2d 346, 96 S. Ct. 1817) from the unprotected zone while including within it child pornography (*New York v. Ferber* (1982), 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348).

I therefore freely concede that, in general, child pornography is worthless rubbish not entitled to the protection of the first amendment. However, the majority's heavy reliance upon *Ferber* is misplaced. *Ferber* only addressed the question of whether a State could constitutionally ban the production and distribution of child pornography which did not meet the legal definition of obscenity. *Ferber* neither reached nor purported to reach the question of a ban on private possession. The conclusion reached in *Ferber*—that child pornography enjoyed no more protection than conventional obscenity—in no way affects the validity of *Stanley*. The obscenity at issue in *Stanley* enjoyed no more protection than the material at issue here. The true rationale for *Stanley* turns not on the nature of the material possessed but on the interest of the private possessor.

Stanley is based on the first amendment's guarantee of personal autonomy of thought. The material protected bore no direct relation to the political process. It had no cultural value. But the State's attempt to ban its mere private possession necessarily implicated the right of the private individual to determine for himself what he reads, sees, or hears in his own home. Any attempt to enforce such a law would necessarily infringe upon personal privacy. The very knowledge that police officers might search private libraries for proscribed material might well have an impact upon liberty of thought and belief. It was for this reason that *Stanley* granted to private possession of even unprotected material the highest protection possible under the first amendment: the State was required to provide "compelling reasons" for proscription.

While the majority's analysis purports to apply a compelling-interest test, it is deficient in several respects.

First, to meet a compelling-interest test, the State must usually show not only that its asserted interest is "compelling," but also that its restriction is "narrowly tailored" to serve that interest. (*First National Bank v. Bellotti* (1978), 435 U.S. 765, 786, 55 L. Ed. 2d 707, 724, 98 S. Ct. 1407, 1421.) There can be no question that an interest in preventing child abuse is compelling. (See, *e.g, Globe Newspaper Co. v. Superior Court* (1982), 457 U.S. 596, 73 L. Ed. 2d 248, 102 S. Ct. 2613.) The true question is whether the interest in preventing such abuse can only be served by a ban on private possession.

The majority reasons that such a ban is needed as a necessary adjunct to bans on production and distribution. Supposedly it is not possible to prevent production and distribution without "drying up" the market for child pornography by banning its consumption. If there is any empirical evidence for this proposition, it has escaped me. But more importantly, this is the very argument which was rejected by the Court in *Stanley*. After summarizing the State's assertion that "prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution," the Court concluded that the protected interest could not be overridden "by the need to ease the administration of otherwise valid criminal laws." (*Stanley*, 394 U.S. at 567-68, 22 L. Ed. 2d at 551, 89 S. Ct. at 1249.) Indeed, acceptance of such an argument would render *Stanley* meaningless, because the State could always argue that a ban on private possession of otherwise unprotected speech was a necessary incident to statutes banning its production or distribution.

I suspect that the true reason for the court's decision is simply that the court believes that child pornography is more harmful than obscenity. There indeed may be some justification for treating material which is harmful more harshly than material which is merely worthless. But such a distinction is not supported by citation to any authority, and, if accepted, would limit *Stanley* pretty much to its facts. It could always

be argued that banning the private possession of harmful material would prevent the harm that the production or distribution of such material has previously caused.

The only compelling interest which might justify banning private possession of such material would be an interest related to a harm which flows from the possession itself, and not merely from prior production or distribution. I think it is arguable, although the majority dopes not emphasize this point, that the State has an independent interest in protecting the privacy of abused children by tracking down and destroying materials which record the invasion of that privacy. The State may have an interest in relieving the "distressful feeling that [the abused child's] act has been recorded for all to see." (Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981).) To put it another way, private possession of child pornography might be seen as a continuing invasion of the child's privacy. But there is no indication, either in the record of the briefs, that this statute was designed to serve such an interest, or that this interest could not be accommodated by more narrowly tailored means. Moreover, since the strength of this interest depends heavily upon the damage done to particular children in particular contexts, a civil suit brought by the child or on the child's behalf would seem to me more narrowly tailored to vindicate the child's interest in regaining peace of mind.

For these reasons, I believe that this statute violates the speech clause of the first amendment to the Federal Constitution, as applied to the States through the due process clause of the fourteenth amendment.

II

Even were I to assume that this statute could pass muster under the Federal Constitution, I would still believe that it

violates article I, sections 4 and 6, of our Illinois Constitution of 1970.

As the majority notes, the parties to this case clearly cited the Illinois Constitution in their briefs. Moreover, their invocation of it was not merely the usual curt appendix to an argument relying principally on the Federal Constitution and Federal precedents (see, *e.g., People v. Davis* (1987), 119 Ill. 2d 61), but a separate argument contained under a separate heading which cited separate authorities. I am therefore particularly disappointed by the majority's failure to separately address it.

Article I, section 6, of our constitution provides that:

> "*The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable* searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." (Emphasis added.) Ill. Const. 1970, art. I, §6.

The report of the Bill of Rights Committee which accompanied the Committee's draft of section 6 clearly envisioned a broad meaning for the term "invasions of privacy." The Committee stated:

> "It is doubtless inevitable that any person who chooses to enjoy the benefits of living in an organized society cannot also claim the privacy he would enjoy if he were to live away from the institutions of government and the multitudes of his fellow men. It is probably also inevitable that infringements on individual privacy will increase as our society becomes more complex, as government institutions are expected to assume larger responsibilities, and as technological developments offer

> additional or more effective means by which privacy can be invaded. In the face of these conditions the Committee concluded that *it was essential to the dignity and well being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly personal behavior were not subject to disclosure or review.* The new provision creates a direct right to freedom from such invasions of privacy by government or public officials." (Emphasis added.) 6 Record of Proceedings, Sixth Illinois Constitutional Convention 31-32.

I should think it would be beyond question that a person's choice of reading or viewing matter falls within a "zone of privacy." For reasons I will elaborate below, reading or viewing something within one's own home is a quintessential example of "highly personal behavior." And while invasion into even this type of privacy might be reasonable if justified by a compelling interest, I cannot, for the reasons I advanced above, agree with the majority that the State has demonstrated a compelling interest.

Even were I to agree with the majority on this point, I would still be troubled by the majority's failure to accord our State constitutional protection of privacy a significance independent of the right of privacy recognized under the Federal Constitution.

While this court has previously suggested that the search and seizure language of article I, section 6, should be construed in lockstep with Federal interpretation of the fourth amendment (*People v. Tisler* (1984), 103 Ill. 2d 226, 241-42), the same court acknowledged that the revision of article I, section 6, in the Constitution of 1970 contained new provisions dealing with eavesdropping and invasions of privacy. (See *Tisler*, 103 Ill. 2d at 242 ("the intent of the constitutional convention was to extend the protection afforded by the fourth amendment of the Federal Constitution and of

our 1870 State Constitution to cover eavesdropping and to protect against invasions of privacy"); *Tisler*, 103 Ill. 2d at 257-58 (Ward, J., concurring) ("the delegates did expand the search-and-seizure provisions in the proposed constitution to include a guarantee of freedom from unreasonable eavesdropping and invasions of privacy").) In other words, our court has implicitly recognized that the citizens of Illinois enjoy greater protection from governmental invasions of privacy under the Illinois Constitution than they enjoy under the Federal Constitution.

In prior opinions I have suggested that we need not march in lockstep with Federal interpretations of Federal constitutional provisions, even when our State constitution is worded similarly. (*People v. Holland* (December 21, 1987), No. 64182 (Clark, C.J., specially concurring); *People v. Tisler* (1984), 103 Ill. 2d 226, 258 (Clark, J., specially concurring).) While not wishing to repeat those arguments in detail, I would note that they apply *a fortiorari* to the right of privacy.

Unlike our State constitution, the Federal Constitution does not contain any specific guarantee of privacy. The "right to privacy," nowhere mentioned in the first 10 amendments to the Federal Constitution, has been inferred from the "penumbras" of specific guarantees actually contained in the Bill of Rights, as applied to the States through the due process clause of the fourteenth amendment. (*Griswold v. Connecticut* (1965), 381 U.S. 479, 481-84, 14 L. Ed. 2d 510, 513-15, 85 S. Ct. 1678, 1680-81.) The Court in *Griswold* reasoned that the values inherent in many of the guarantees, particularly those of the first amendment and fourth amendments, bespoke a concern for privacy. The Court also relied on the ninth amendment's reservation of rights to the people.

This approach has been the subject of great criticism and debate. A particular focus of concern has been the extent to which unelected Federal judges may be tempted to use

privacy as a tool for the open-ended review of the wisdom or appropriateness of legislation. A related concern has been the perceived absence of any textual or historical support for a constitutional right of privacy. (See, *e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973).) It has been felt that the absence of such support allows judges, under the guise of interpreting a right of privacy, to write their personal predilections into law.

Perhaps in response to this criticism, the United States Supreme Court has limited the right of privacy in two distinct, although interrelated, ways. First, it has tended to recognize as protected by the right of privacy choices and activities which are related to the family, among them: contraception (*Griswold v. Connecticut* (1965), 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678), abortion (*Roe v. Wade* (1973), 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705), and familial living arrangements (*Moore v. City of East Cleveland, Ohio* (1977), 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932). The justification for this focus upon the family has been the perception that the family preceded the establishment of civil society and that its preservation must therefore be among the "rights reserved to the people." (*Griswold*, 381 U.S. at 495-96, 14 L. Ed. 2d at 522, 85 S. Ct. at 1688 (plurality opinion).) Second, the Court has sought to find, wherever possible, historical bases for recognized rights of privacy. The Court has derived rights of privacy by scrutinizing the laws and mores prevalent in the late eighteenth and early nineteenth centuries, with an eye towards whether a particular practice was commonly accepted or, instead, routinely proscribed. Thus the Court has derived rights to contraception and abortion from the early lack of legislation against these practices. (See *Roe*, 410 U.S. at 129-40, 35 L. Ed. 2d at 164-70, 93 S. Ct. at 715-20.) Similarly, it derived a right to live in nonconventional living arrangements from the historical prevalence of extended families. (See *Moore*, 431 U.S. at 507-510, 52 L. Ed. 2d at 542-44, 97 S. Ct. at 1939-41

(Brennan, J., concurring, joined by Marshall, J.).) On the other hand, the universal criminalization of nonconventional sexual practices in colonial and nineteenth-century America has been cited to support the proposition that there is no constitutional right to engage in sodomy. *Bowers v. Hardwick* (1986), 478 U.S. ___, ___, 92 L. Ed. 2d 140, 146-48, 106 S. Ct. 2841, 2844-46.

I express no opinion about the merits of any of the issues described above, and I would not hesitate to use parts of the Supreme Court's approach in the interpretation of our own guarantee against invasions of privacy. But I am concerned with the absolute subservience to Federal precedent which the majority's uncritical citation of *Hardwick* seems to reflect. The Supreme Court's approach is a guide. It is persuasive. But it is not gospel. I see no reason to limit the "privacy" protected against invasion exclusively to matters relating to the family, although the preservation of family life is obviously of supreme importance. And I do not believe that we are bound by the norms and mores of our ancestors, instructive as these may be. We, unlike the United States Supreme Court, are dealing with an explicit, rather than an implicit, provision. We are not constrained by the folkways of 1770 or 1870 in the interpretation of a constitution which was adopted in 1970. Nor must our interpretation of privacy proceed in a void. The committee reports, the debates of the convention, and the explanation given to the adopting electorate all are sources for determining its meaning under our State constitution.

As I have stated above, I think the key to the interpretation of our guarantee against unreasonable invasions of privacy is the reference to "highly personal behavior" in the committee report. Behavior can be "highly personal" in one of two senses: it can be "personal" because it reflects individualized drives, peculiarities, or tastes, or because it does not normally affect or harm other individuals. In general,

private reading, viewing, and thinking are just such activities. They are highly personal in the sense that they play an important role in forming the human personality, and highly personal in the sense that they will rarely impinge on the legitimate interests of persons other than the person who does the reading, viewing, or thinking. The interest in free access to such activities is fundamental, standing at the confluence of privacy and speech. Since I believe that the majority's opinion fails to give it the proper weight, I dissent.

DATED MAY 31, 1988

Nos.64173, – People State of Illinois, appellant, v. John E.
64466 Cons. Geever, et al., appellees. Appeals, Circuit Court (DuPage) (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

PEOPLE OF THE
STATE OF ILLINOIS,
Plaintiff,

-vs-

JOHN GEEVER,
Defendant.

NO. 85 CF 2162

ORDER

This cause having come on to be heard upon the motion of the defendant and the Court being fully advised in the premises, and having jurisdiction of the subject matter:

IT IS HEREBY ORDERED Motion to Dismiss Counts 1-12 of the indictment returned herein is granted. Cause is continued to 10-1-86 at 9 a.m. in #209 for status, Defendant's presence is waived.

Enter: EDWARD W. KOWAL
Judge

Date: 9-17-86

PEOPLE OF THE
STATE OF ILLINOIS,
Plaintiff,

-vs-

CHAR GEEVER,
Defendant.

NO. 85 CF 2163

ORDER

This cause having come on to be heard upon the motion of the defendant and the Court being fully advised in the premises, and having jurisdiction of the subject matter:

IT IS HEREBY ORDERED Motion to Dismiss Counts 1-12 of the indictment returned herein is granted. Cause is continued to 10-1-86 at 9 a.m. in #209 for status, Defendant's presence is waived.

Enter: EDWARD W. KOWAL
Judge

Date: 9-17-86

IN THE CIRCUIT COURT OF DU PAGE COUNTY
FOR THE EIGHTEENTH JUDICIAL
CIRCUIT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs

JOHN E. GEEVER and CHARLENE C. GEEVER,
Defendants.

No. 85 CF 2162
85 CF 2163

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable EDWARD W. KOWAL, Judge of said Court, on Wednesday, the 17th day of September, A.D. at the hour of 9:00 o'clock a.m.

PRESENT:

MR. JAMES E. RYAN, State's Attorney of
DuPage County, by
MS. LEANN G. STAMAT,
Assistant State's Attorney,

appeared on behalf of the People
of the State of Illinois.

MR. JEFFREY B. FAWELL,

appeared on behalf of the Defendants.

THE CLERK: Charlene Geever. John Geever.

MS. STAMAT: Good morning, your Honor. Leann Stamat on behalf of the People.

MR. FAWELL: Good morning, Judge. Jeff Fawell on behalf of the Defendants.

THE COURT: This matter was already briefed and argued concerning Counts I through XII; is that right?

MS. STAMAT: That's correct, Judge.

MR. FAWELL: Yes, Judge.

THE COURT: On motion to dismiss. This applies to both Defendants. I appreciate the briefs submitted by both sides.

After thoroughly going into this matter, based upon the wording of the Indictments I through XII, I believe if I take I, it would probably be sufficient for all of them. It had to do with the offense of child pornography. Said Defendants, with knowledge of the nature thereof, possessed a photograph of a child whom they knew or should have known was under the age of 18 and engaged in an act of sexual conduct, so forth. This is the basic wording of all Charges I through XII.

It's the Court's decision that motion to dismiss will be granted, and the reasoning is quite well set out in Stanley versus Georgia, which is still the law. And this is not a situation of possession with intent to deliver, so forth. It merely means possession. And there is nothing that has in any way changed the law since 1969 under the case of Stanley versus Georgia.

Therefore, motion to dismiss will be granted as to Counts I through XII. That applies to both Defendants.

That still leaves the balance of the charges; is that right?

MS. STAMAT: That's correct, Judge.

MR. FAWELL: Yes, Judge.

THE COURT: All right. I don't know what the State's position is, if you want a status date for purposes of appeal.

MS. STAMAT: If we could, Judge.

THE COURT: Two weeks?

MR. FAWELL: Fine.

MS. STAMAT: Fine.

MR. FAWELL: Whatever you want.

THE COURT: All right. We will set this matter for October 1st, al right?

MS. STAMAT: That's fine, Judge.

MR. FAWELL: Judge, may I check that? That's fine.

THE COURT: October 1, 9 a.m.

MS. STAMAT: Thank you.

THE COURT: Draw the appropriate order.

MR. FAWELL: Thank you, Judge.

(Which were all of the proceedings had at the hearing of the above-entitled cause, this date.)

NO. 64173

IN THE
SUPREME COURT OF ILLINOIS

JOHN E. GEEVER and CHARLENE GEEVER,
Defendant-Appellants

vs

STATE OF ILLINOIS,

Appeal from the Circuit Court of the 18th Judicial Circuit, DuPage County, Illinois

Nos. 85 CF 2162, 2163

The Hon. Edward W. Kowal
Judge Presiding

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JOHN E. GEEVER and CHARLENE GEEVER, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Illinois, affirming the Judgment entered herein on May 31, 1988.

This appeal is taken pursuant to U.S.C., Section 1257(2).

JERRY B. FAWELL
FAWELL AND FAWELL
Counsel for Appellants
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Wheaton, IL 60187

CERTIFICATE AND PROOF OF SERVICE

TO: John W. Cockrell, Clerk, 18th Judicial Circuit Court, Wheaton, IL 60187

Juleann Hornyak, Supreme Court Bldg., Springfield, IL 62706

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Louis B. Garippo, Thomas A. Moore, Louis B. Garippo, Ltd., 100 W. Monroe Street, 18th Floor, Chicago, IL 60603

I. JEFFREY B. FAWELL, a member of the Bar of this Court, hereby certify that on this 19th day of August, 1988 three (3) copies of the Notice of Appeal to the United States Supreme Court in the above entitled case were mailed, first class postage prepaid, to Mr. Neil F. Hartigan, Attorney General for the State of Illinois, 100 West Randolph Street, 12th Floor, Chicago, Illinois, 60601 as counsel for the Appellee and to each of the other persons above listed at their respective addresses above listed. I further certify that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
SEP 30 1988
JOSEPH E. SPANIOL, JR.
CLERK

(2)

No. 88-381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN AND CHARLENE GEEVER,

Appellants,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

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16 pp

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction because the judgment appealed from is not a final judgment within the meaning of 28 U.S.C. § 1257?

2. Whether this appeal fails to raise a substantial federal question meriting review in this Court at the present time, because the decision below is correct and is not in conflict with the decisions of any other state or federal court?

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No. 88-381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN AND CHARLENE GEEVER,

Appellants,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

Appellee, the People of the State of Illinois, now move this Court to dismiss the appeal brought by appellants because: 1) the judgment appealed from is not a final judgment within the meaning of 28 U.S.C. § 1257; and 2) the appeal does not present a substantial federal question meriting review by this Court.

STATEMENT OF THE CASE

Because appellants' statement of the case omits certain facts necessary to the determination of whether this Court lacks jurisdiction, the following statement is provided by appellee.

On December 12, 1985, a nineteen-count indictment was returned by a grand jury in DuPage County, Illinois, charging appellants with violations of various provisions of the Illinois child pornography statute, *Ill. Rev. Stat.* 1985, ch. 38, par. 11-20.1(a). Counts one through twelve charged appellants with possession of photographs depicting children engaged in acts of oral sex and lewd fondling, in violation of section 11-20.1(a)(2). These are the charges which are the subject of this appeal. Other charges not at issue include indecent liberties with a child [section 11-4(a)(2)], soliciting a child to appear in a pornographic videotape [section 11-20.1(a)(4)], exhibiting harmful material to a child [section 11-21(a)], and conspiracy [section 8-2(a)] to commit child pornography.

Appellants filed a pretrial motion to dismiss the possession charges on the ground that the statute prohibiting possession of child pornography violates the First and Fourteenth Amendments. The motion was granted, and appellee appealed directly to the Illinois Supreme Court. The remaining charges were placed on inactive status pending the outcome of the direct appeal. (C. 86)

The Illinois Supreme Court reversed the trial court's ruling and remanded the case for trial. A petition for rehearing was denied on May 31, 1988. Subsequently, appellants sought and received a stay of the mandate pending disposition of their appeal to this Court. They have yet to be tried on any of the charges in the indictment.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE JUDGMENT APPEALED FROM IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257.

Appellants invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(2). The jurisdiction conferred by § 1257 to review state court decisions is limited to "[f]inal judgments" of the highest state court in which a decision could be had. Generally, the finality requirement precludes review in this Court where further proceedings in the state courts, other than those of a ministerial nature, are ordered by the decision from which appeal is sought. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In criminal cases, a judgment is ordinarily not final within the meaning of § 1257 unless it includes the imposition of a sentence. *Flynt v. Ohio*, 451 U.S. 619, 620 (1981); *Bateman v. Arizona*, 429 U.S. 1302, 1306 (1976) (Rehnquist, J., Circuit Justice). Here, appellants have not yet been tried, convicted, or sentenced. If the judgment from which they seek to appeal is to be considered final, then it must be found to fit within some exception to the general rule.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court recognized that under certain limited circumstances, state court judgments may be treated as final despite the fact that they are interlocutory in nature. Four categories were identified and described. However, the Court observed that "[i]n most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by this Court at a later date. . ." 420

U.S. at 477. Such is not the case here. In addition to their constitutional challenge to the statute, appellants have challenged, on Fourth Amendment grounds, the validity of the search warrant with which the police entered their house and seized the photographs. (C. 73-74) Although the trial court denied the motion to suppress (C. 82), the validity of the warrant is likely to be an issue on appeal if appellants are convicted. Thus, if this appeal is not dismissed, the risk arises that resolution of the federal questions necessary to a final disposition of this case will be arrived at in piecemeal fashion. *See, e.g., Flynt*, 451 U.S. at 621.

Moreover, this case does not fit within any of the exceptions discussed in *Cox*. The first is described as "those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. Cited as an example was *Mills v. Alabama*, 384 U.S. 214 (1966), where the defendant had no defense to the criminal charge other than his federal claim. Here, appellants have a number of potential defenses, both federal and non-federal, other than their present claim: they may assert that the photographs do not depict any of the activities described in section 11-20.1(a)(1); they may assert any of the affirmative defenses listed under section 11-20.1(b); and if convicted, they may prevail on appeal on the Fourth Amendment issues raised in their motion to suppress. The result on remand, therefore, is not preordained.

In the second category are cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480.

Again, this is not the case here, since appellants may prevail at trial or on appeal on one of their alternative defenses.

The third category includes cases in which review of the federal claim can only be had at the interlocutory stage, because "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481. It is true that if appellants prevail on any of their alternative defenses, the issue they now raise would be moot, but if convicted they would still be able to obtain review in this Court, even if the state courts declined to reconsider what the Illinois Supreme Court has decided. This Court has often taken jurisdiction on certiorari to decide issues determined by the state courts at earlier stages of the proceedings, saying that "our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. . ." *Reece v. Georgia*, 350 U.S. 85, 87 (1955). *Accord*, *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982); *Davis v. O'Hara*, 266 U.S. 314, 321 (1924). Thus, the federal claim presented here would be reviewable in this Court following the remand if appellants are convicted and the convictions are affirmed by the state courts.

The fourth and final category is the only one arguably applicable here. It includes cases:

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on

> the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-483. It is true that if, on remand, appellants prevail on the merits of a non-federal ground, their present claim would be moot. However, reversal of the Illinois Supreme Court would preclude further litigation only on the possession charges. In any case, refusal to grant immediate review would not "seriously erode federal policy."

In the decisions following *Cox* which invoke this exception to the finality requirement, considerations above and beyond the significance of the federal question played an important role in the determination to allow interlocutory review. *See Calder v. Jones*, 465 U.S. 783, 787-788 and n.8 (1984) (federal issue was whether First Amendment considerations effected exercise of *in personam* jurisdiction over out-of-state publisher in defamation action, and if review not granted defendant would have to appear generally and waive jurisdictional defect) and *Shaffer v. Heitner*, 433 U.S. 186, 195 and n.12 (1977) (same); *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (California statute nullifying arbitration clause in contract between parties would be reviewed since, if parties forego arbitration and resort to court, federal issue would escape review); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (federal issue collateral to the merits and ripe for review). On the other hand, where, as here, the federal question will survive the remand and

other federal questions may arise following the remand, this Court has postponed review until after the trial on the merits. *See Flynt, supra.*

For these reasons, this Court should dismiss the appeal for want of jurisdiction.

II.

THIS APPEAL FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION MERITING REVIEW IN THIS COURT AT THE PRESENT TIME, BECAUSE THE DECISION BELOW IS CORRECT AND IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER STATE OR FEDERAL COURT.

Appellants assert that *Stanley v. Georgia*, 394 U.S. 557 (1969) controls this case (Jurisdictional Statement at 11), because it holds that while the states are free to regulate the dissemination of speech which is outside the protection of the First Amendment, even unprotected speech is absolutely immune from regulation if it is found in the home. (Jurisdictional Statement at 10) That is not the holding of *Stanley*. The holding of *Stanley* is that the governmental interests which justify regulating the dissemination of obscene materials do not justify criminalization of the private possession of such materials. In reaching that conclusion, this Court employed a balancing test—it identified the interests of the individual that the Georgia statute impacted upon, it considered the justifications for the statute offered by the state, and it determined that the latter were not sufficiently compelling to overcome the former. 394 U.S. at 564-568. The Court noted that its holding was limited, and was not to be construed as foreclosing attempts to criminalize possession of "other types of printed, filmed, or recorded materials." *Id.* at 568, n.11. Later cases have held that *Stanley* is

limited to its facts and is not to be extended. *Bowers v. Hardwick*, 106 S.Ct. 2841, 2846 (1986); *United States v. 12200-ft. Reels of Super 8 m.m. Film*, 413 U.S. 123, 127-128 (1973) (the holding of *Stanley* was "explicitly narrow and precisely delineated", and the Court is "not disposed to extend the precise, carefully limited holding of *Stanley*. . ."); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66-68 (1973).

As this Court recognized in *New York v. Ferber*, 458 U.S. 747 (1982), child pornography is unprotected speech, and the governmental interest in regulating it is different from the interest in regulating obscenity. The rationale for regulating obscenity is the "legitimate interest in prohibiting dissemination or exhibition of obscene materials when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller v. California*, 413 U.S. 15, 18-19 (1973). Clearly, this interest is not advanced by a ban on private possession. However, the interest in regulating child pornography has little if anything to do with protecting the unwilling or underaged viewer. It has to do with " 'safeguarding the physical and psychological well-being of a minor' ". *Ferber*, 458 U.S. at 756-757. The *Ferber* opinion catalogues in great detail the physical and emotional harm done to the child who has been used in the production of pornography. 458 U.S. at 758-759 and n.n. 9 and 10. The court below correctly recognized that, while the individual interests at stake here are the same as those asserted in *Stanley*, *see* A-11, the governmental interests are different and more compelling—so much so, that the balance tips in favor of the statute. A-12-14.

Unlike the case with obscenity, where the only danger to the public lies in the unregulated display of the ma-

terials, child pornography causes damage by its very existence. The preservation of a photographic record, for all to see, of a degrading and humiliating event often causes life-long psychological trauma to the child-victim. The Illinois Supreme Court determined that the legislative intent behind section 11-20.1 was "to prevent the sexual abuse and exploitation of children by 'drying up' the market for child pornography", and that a ban on possession was an essential element, necessary "to 'dry up' the final *and most important* link in the chain of distribution of child pornography." A-12-13. (emphasis added).

Appellants argue that the right they are asserting is the right to receive ideas. (Jurisdictional Statement at 9-10) However, the right to receive ideas is not as dramatically affected by section 11-20.1(a)(2) as appellants say it is. The statute prohibits only the possession of "any film, videotape, photograph, or other similar visual reproduction" depicting children actually or by simulation engaged in certain specified sexual acts. It does not prohibit possession, or even dissemination, of books or drawings depicting fictional children in a sexual context, nor does it prohibit possession or dissemination of photographs depicting youthful-appearing adults. It is not directed at the moral content of the pedophile's character. What the statute does is draw a line at the point where satisfaction of the pedophile's aberrant curiosity requires the sexual abuse and exploitation of real children.

Appellants also argue that if this statute is upheld, a step will have been taken down the slippery slope leading ultimately to censorship of sexually oriented materials depicting adults, in the name of protecting them from exploitation. It should not require extended discussion to make the point that the law differentiates between adults and minors in several respects, protecting minors from

the consequences of activities that they are ill-equipped to deal with because of their lack of maturity while leaving adults to fend for themselves.

Besides Illinois, eleven states have laws prohibiting possession of photograph depictions of children engaged in sexual conduct. Ala. Code § 13A-12-192(b) (1984); Ariz. Rev. Stat. Ann. § 13-3553 (1985); Fla. Ann. Stat. § 827.071(4) (1985); Minn. Stat. Ann. § 617.247(4) (1983); Nev. Rev. Stat. Ann. § 200.730 (1986); Ohio Rev. Code Ann. § 2907.322(A)(5) (Baldwin 1986); Okla. Stat. Ann., title 21, § 1021.2 (1987 Supp.); S.D. Codified Laws, title 22-22-23.1 (1987 Supp.); Texas Penal Code Ann. § 43.26(a)(1) (Vernon 1987 Supp.); Utah Code Ann. § 76-5a-3(1)(a) (1987 Supp.); Wash. Rev. Code § 9.68A.070(1) (1987 Supp.). Besides the Illinois Supreme Court, two other state supreme courts have upheld the constitutionality of their statutes against First Amendment challenges based on *Stanley*. *Ex Parte Felton*, 526 So.2d 638 (Ala. 1988); *State v. Meadows*, 28 Ohio St. 2d 43, 503 N.E.2d 697 (1986), *cert. denied*, 107 S.Ct. 1581 (1987). *Cf. In Re Duncan*, 189 Cal. App. 3d 1348, 234 Cal. Rptr. 877, *cert. denied*, 108 S.Ct. 501 (1987) (upholding statute making it unlawful to knowingly develop, duplicate, print, or exchange any film, photograph, videotape, negative or slide depicting child pornography against claim of overbreadth because statute invades *Stanley* zone of privacy). In the three state supreme court decisions, only one, the decision below, contains a dissent, filed by Justice Clark. It is noteworthy that Justice Clark does not agree with appellants' contention that *Stanley* controls this case. Instead, he finds the statute objectionable only because it is not the most narrowly-tailored means of vindicating the asserted state interests, believing that civil lawsuits by traumatized child pornography victims against the possessors of photographs provides an adequate remedy. A-23. It is equally note-

worthy that appellants do not espouse Justice Clark's views. Thus, the state supreme courts which have considered appellants' position have unanimously rejected it, and those decisions are not in conflict with the decisions of any federal court. Accordingly, no substantial federal question is presented, and the appeal should be dismissed.

CONCLUSION

For all the foregoing reasons, appellee respectfully requests that this Court dismiss this appeal.

Respectfully submitted,

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